



WdC

## Decision

Matter of: Olympus Corporation

File: B-225875

Date: April 14, 1987

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### DIGEST

1. Provision in regulation concerning when a total small business set-aside is appropriate for items procured under Industrial Readiness Program is inapplicable where agency does not procure solicited items pursuant to the Industrial Readiness Program.
2. Provision in regulation concerning when a total small business set-aside is appropriate for items on Qualified Products List is inapplicable where offerors are qualified--pursuant to source control drawing.
3. Portion of protest alleging that firms are dominant in industry and thus not small business concerns is dismissed since Small Business Administration has conclusive authority to determine matter of small business size status.
4. The contracting agency need not make determinations tantamount to affirmative determinations of responsibility on expected small business offerors before deciding to restrict the solicitation to small business concerns. The agency is obligated to make only an informed business judgment that at least two responsible offerors will compete and award will be made at a reasonable price.

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### DECISION

Olympus Corporation, a large business, protests the decision by the Department of the Army to purchase borescope kits under total small business set-aside procedures. The protest is dismissed in part and denied in part.

On October 30, 1986, the Army issued request for proposals (RFP) No. DAAJ09-87-R-0141. The competition was limited to approved sources, companies that had previously demonstrated their ability to supply a product which conformed to source

control drawing number 6650-T700-003. Copies of the solicitation were sent to five approved sources. Four of these five companies, including Olympus, had been approved by General Electric Company (GE), the original design source. The fifth, Lenox Instrument Company, was qualified pursuant to GE's source control drawing, but the Army acted as the approving authority.

On November 24, the Small Business Administration (SBA) contacted the Army's contracting officer and advised her that two of the approved sources, Instrument Technology, Inc. (ITI) and Lenox Instrument Company, were small business concerns. The SBA representative recommended that the solicitation be changed to a total small business set-aside.

Following the SBA notification, the contracting officer concluded there was a reasonable expectation that offers would be obtained from at least two responsible small business concerns and that award would be made at reasonable prices. Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502-2 (1986). On December 3, an amendment was issued changing the procurement to a total small business set-aside. On December 8, Olympus filed this protest with our Office.

Olympus maintains that the Army violated certain provisions of the FAR in setting aside this procurement for small businesses. Specifically, Olympus argues that paragraphs (b) and (c) of FAR, 48 C.F.R. § 19.502-5, prohibit a total small business set-aside in this situation. Paragraph (b) prohibits setting aside a procurement when the item to be acquired is on an established planning list under the Department of Defense (DOD) Industrial Readiness Program and when that list contains a large business Planned Emergency Producer which conveys a desire to supply the item.<sup>1/</sup> Paragraph (c) prohibits establishing a total small business set-aside when an item to be procured is on a Qualified Products List (QPL) and the QPL contains products of a large

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<sup>1/</sup> The Industrial Readiness Program encompasses planning by DOD with possible producers of essential military items in order to assure the capability for production during periods of national emergency. A Planned Emergency Producer is an industrial firm which has indicated its willingness to produce specified military items in a national emergency by completing an Industrial Preparedness Program Production Planning Schedule (DD Form 1519). See DOD FAR Supplement, 48 C.F.R. § 208.070; DOD Instruction "Industrial Preparedness Planning" (April 18, 1985).

business which desires to participate in the acquisition. We conclude that neither provision precludes a set-aside in this case.

Olympus contends that the agency cannot set aside the procurement because the item solicited allegedly is procured under the Industrial Readiness Program. In its report to our Office, however, the Army stated that borescope kits are not procured under the Industrial Readiness Program and therefore the item solicited here is not on any planning list compiled under that program.

In responding to the Army's report, Olympus presents no evidence rebutting the assertion that the items sought are not procured pursuant to the Industrial Readiness Program. Nonetheless, it continues to present arguments based on the assumption that the set-aside restriction concerning the Industrial Readiness Program is applicable.

FAR, 48 C.F.R. § 19.502-5(b), clearly requires that items be on an established planning list under the Industrial Readiness Program before the prohibition of a total set-aside becomes effective. See Litton Electron Devices, B-225012, Feb. 13, 1987, 66 Comp. Gen. \_\_\_, 87-1 C.P.D. ¶ 164. We find no evidence that borescope kits are purchased pursuant to that program, and thus there is no prohibition against the item being set aside.

We also do not find applicable to this procurement paragraph (c) of FAR, 48 C.F.R. § 19.502-5, which provides that a total small business set-aside is inappropriate where an item to be procured is on a QPL and the QPL contains products of a large business which desires to participate in the acquisition.

Olympus does not dispute the Army's assertion that no QPL was prepared for this procurement. Nonetheless, it argues that the actions taken by the Army in approving one of the small business concerns were substantially the same as the actions it would have taken to prepare a QPL. Therefore, Olympus argues that the restriction contained in paragraph (c) of FAR, 48 C.F.R. § 19.502-5, should apply here.

With regard to testing a product and ensuring quality assurance, we recognize the similarity between the establishment of a QPL and the qualification of prospective offerors on the basis of a source control drawing. Our Office has previously compared the two types of qualification

procedures. See General Electric Company, B-186759, Nov. 15, 1976, 76-2 C.P.D. ¶ 411; General Electric Company, B-185698, May 12, 1976, 76-1 C.P.D. ¶ 315. While the distinctions we relied on in our earlier cases may be inapplicable here, we nonetheless conclude that the two types of qualification procedures are separate and distinct, and we have no basis to question the agency's policy decision not to apply the QPL procedures to the Component Breakout Program. Since there was no QPL related to this procurement, we conclude that the FAR provision, 48 CFR § 19.502-5(c), prohibiting a total small business set-aside for items on a QPL, is not applicable.

Our decision on this issue is further supported by the fact that the FAR, 48 C.F.R. § 19.502-5, in general, provides a list of situations under which small business set-asides should be made. The purpose and intent of this section is clearly to promote small business set-asides. The provisions within paragraphs (b) and (c) of this section, which Olympus relies on, provide limited exceptions to the overall directives of the section. In arguing that the Army's approval of one of the five companies pursuant to a source control drawing should bring this procurement within the exception in paragraph (c) concerning QPLs, Olympus is essentially asking that we expand the scope of that exception. We decline to do so.

Olympus also raises several additional matters related to the procurement. We find no basis for its protest of these issues.

Olympus alleges that ITI and Lenox, the two qualified small business sources, are dominant in the borescope industry. Olympus suggests that ITI and Lenox should not be considered small businesses since, by definition, a small business cannot be dominant in its field. FAR, 48 C.F.R. § 19.001.

Under 15 U.S.C. § 637 (1982), the SBA has conclusive authority to determine matters of small business size status for the purposes of federal procurements. Accordingly, our Office will not consider size status protests. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(2) (1986); Advance Machine Company, B-217399, Sept. 20, 1985, 85-2 C.P.D. ¶ 311. The protest is dismissed as to this issue.

Olympus next questions the capability of ITI and Lenox to provide a continuing supply of the items sought. We interpret Olympus' arguments on this issue as a challenge to the responsibility of the two firms.

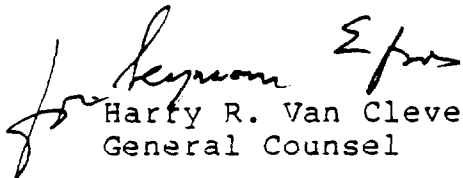
A contracting agency need not make determinations tantamount to affirmative determinations of responsibility before deciding to set aside a procurement for exclusive small business participation. Anchor Continental, Inc., 65 Comp. Gen. 270 (1986), 86-1 C.P.D. ¶ 137. While the standards of responsibility enunciated in the FAR may be relevant in making a set-aside determination, the agency is only obligated to make an informed business judgment that at least two responsible offerors will compete and award will be made at a reasonable price. Anchor Continental, Inc., supra.

Here, Olympus provides no support for its assertion that ITI and Lenox are not responsible. In fact, this argument appears inconsistent with Olympus' immediately preceding argument that the two firms dominate the industry. In these circumstances, Olympus' speculative allegation provides no basis to question these set-aside decisions.

Finally, Olympus states that the products solicited will not be used exclusively within the United States. It argues that such foreign use "limits the applicability of the Small Business Administration policy."

Although the solicitation requires that the procured items be manufactured or produced by a small business inside the United States, we are unaware of, and Olympus does not identify, any authority which requires products procured under small business set-aside procedures to be used exclusively within the United States. Accordingly, we find no merit in this argument.

The protest is dismissed in part and denied in part.

  
Harry R. Van Cleve  
General Counsel